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NOTES OF INDIAN CASES.

Parvathy Ammal v. Gopala Goundar, (1956) 2 M.L.J. 468.

It is held in this case that the omission to perform Saptapadi is not material where the essential ceremony of tying the *thali* has been done; and where the parties have gone through some form of marriage and have been living as husband and wife the general presumption in favour of a valid marriage will attach. In *De Thoren* v. *Attorney-General*[1], Lord Cairns, L.C., remarked: "The presumption of marriage is not the same as the presumption raised with regard to other facts, which may be presumed either the one way or the other; the presumption of marriage is something much stronger; from cohabitation with reputation a marriage is to be presumed unless there is strong and cogent evidence to the contrary". In *Sastry Veladder Aronegary* v. *Sembecutty Vaigalie*[2], the wife had admitted in cross-examination that "other ceremonies were necessary for the marriage but were not performed". Sir Barnes Peacock nevertheless thought that it only meant that the witness was probably better acquainted with what ceremonies were usually performed than what were actually essential for the legality of the marriage, that it was evident from the parties going through the form of marriage that they intended to be married, and if they were not married according to the strict custom it was not in consequence of their wish that it should be so. In the particular case the performance of other ceremonies could not be done on account of disturbances caused by persons who wanted to obstruct the marriage. Saptapadi is one of the important ceremonies of a sastraic marriage among the Hindus. According to Manu the marriage becomes final and irrevocable only on performance of Saptapadi. According to a text of Yama the marital relationship arises only by the performance of ceremonies commencing with Panigrahana and ending with Saptapadi. In particular communities customs have developed dispensing with the need for performing some of the ceremonies. In *Audikesavalu* v. *Ramanujam*[3] a custom dispensing with the performance of Vivaha Homa and Saptapadi in the community to which the parties belonged was held to be established and the validity of the marriage was affirmed. Even the tying of a *thali* in the presence of friends and relatives before an idol in a temple was considered to constitute a valid marriage where the usage of the particular community had dispensed with other ceremonies, In re *Ponnuswami*[4]. The practice of tying a *thali* as of the essence of a Hindu marriage marks a later evolution in the marriage law of the Hindus. It is considered in many communities as being even more important than performance of ceremonies like Homa or Saptapadi. In *Thirumalai Naicker* v. *Ethirajamma*[5], the Court had to consider the effect of the tying of a *thali* followed by the living of the parties as man and wife and their being received as a married pair. The parties were Nayakars. The woman was a widow with a son by her first husband. She married again and at the time of the litigation had two surviving children of the second alliance. The evidence

1. L.R. (1876) 1 A.C. 686.
2. L.R. (1881) 6 A.C. 364 (P.C.).
3. (1909) I.L.R. 32 Mad. 512.
4. (1950) 2 M.L.J. 200.
5. (1946) 1 M.L.J. 438.

as to ceremonies was that in the centre of the courtyard a lamp was lit, a purohit officiated, and a *thali* known as *naduveetu thali* was tied. The Court held that there was not enough evidence to find that this form of marriage was recognised by a custom among the Nayakars. The Court preferred to rest its conclusion on "the general presumption which ought to be drawn in favour of a valid marriage when the fact of the celebration of some form of marriage is established" there being no evidence showing that that form was invalid. In other words, where some form of marriage has been gone through, continuous cohabitation and repute that the parties are man and wife will raise a presumption of valid marriage. In the instant case, the evidence showed that ceremonies like Vigneswara Pooja, Kalasa Pooja and Mangalya Pooja were performed and there was the tying of the *thali*. It also showed that ceremonies like Pada Pooja, Homam, Ammi Mithitha and Saptapadi were not performed. It was also found that there was no custom of the community that Saptapadi need not be performed. The learned Judge was impressed by the fact that the tying of the *thali* has been regarded as an essential incident of the marriage, that there is no decision holding that the mere omission to perform Saptapadi will invalidate a marriage, and that in any event when there is the tying of the *thali*, non-performance of the Saptapadi is not fatal to the validity of the marriage. It is debatable whether in view of the sastraic injunction that marital relationship arises only on the performance of the ceremonies commencing with the Panigrahana and ending with Saptapadi, the marriage would be valid according to the sastras in spite of the failure to perform Saptapadi, or whether the *factum valet* doctrine could apply to the case. But, as pointed out, though there was no custom of the community recognising the form in which the marriage in question was performed, still, the general presumption of a valid marriage may be drawn on the basis of continued cohabitation and repute. This view is in conformity with the policy behind section 7 of the Hindu Marriage Act, under which the performance of ceremonies seems to be optional with the parties, and where they decide to have ceremonies the marriage may be solemnised in accordance with customary ceremonies of either of the parties to the marriage.

MANICKA GOUNDAN *v.* ELUMALAI GOUNDAN, (1956) 2 M.L.J. 536.

This case deals with a question on which there is little direct authority. The principles of the Specific Relief Act concerning specific performance are merely a crystallisation into statutory form of an equitable remedy as developed in England. A Court is not bound to grant specific performance in every case where an agreement to sell has not been carried out in its entirety. Laches of the vendee or fraudulent conduct on his part may well disqualify him for purposes of such relief. Where an agreement to sell has been followed up by the execution of a regular sale deed the question has been raised whether in the event of failure to have the sale deed registered a suit for specific performance of the agreement to sell will be competent. Two extreme views have been taken. Some decisions have held that a party will in no circumstance have a right to seek specific performance of the agreement when once a document has been executed in pursuance of the agreement though the document is not registered. Some other decisions have held that a party to an agreement can compel the other party to give specific performance so long as no document has been registered. In *Venkataswami* v. *Kristayya*[1], there was an agreement to transfer a mortgage and in pursuance of it the defendant duly executed a deed but it was not registered. The plaintiff sued to have a fresh deed executed and registered. It was held that the proper course for the plaintiff was to have exploited the remedy available to him under the Registration Act for that purpose and followed it up by a suit under section 77 if he had failed to obtain his rights by such proceedings. The conclusion of the Court was that "such a suit will not lie on the general principle that, when a statute creates a right or an obligation and provided a method of enforcing it that method and no

1. (1893) 3 M.L.J. 169 : I.L.R. 16 Mad. 341.

the remedy at Common Law, must be followed". In *Palani Goundan* v. *Paramasiva Goundan*[1], the Registrar had refused to register a sale deed on the ground of non-presentation of the document for registration within four months of its execution under section 34. The Court held that in those circumstances the proper remedy was to bring a suit to compel registration and no suit for execution of a fresh document by the vendor will lie. In *Sanga Thevar* v. *Thanukodi Ammal*[2], it was stated that when once an oral contract has become executed and has taken the shape of a document there is no more any scope for enforcing the oral contract between the parties, and the remedy open to the aggrieved person is only to resort to the procedure prescribed by section 77 of the Registration Act. Relaxation of the principle laid down in these cases has been permitted where the document executed in implementation of the contract had been accidentally lost, or stolen or destroyed. In *Nynakka Routhen* v. *Vavana Mahomed Routhen*[3], an instrument of sale was executed on August 9, 1866 and shortly thereafter was destroyed accidentally by fire except for a charred fragment. On 13th November, the District Registrar refused to register what was legible on the fragment. It was held in a suit to compel the defendant to execute another instrument to the same effect as that which had been destroyed that secondary evidence of the contents was admissible and that the defendant could be compelled to execute a fresh instrument of sale. In *Chinna Krishna Reddi* v. *Doraiswami Reddi*[4], a document of conveyance was executed but before it could be registered the vendor procured the theft of the document and concealed it for the purpose of preventing the registration thereof. The plaintiff was in the circumstances held entitled to specific performance and to have a fresh document executed and registered. In the course of his judgment Benson, J., observed : "The present case stands on a totally different footing. In it the first defendant fraudulently made away with the document after its execution and before its registration. It was therefore impossible for the plaintiff to register it. In such a case the plaintiff is clearly entitled to have a fresh document executed and registered just as he would be entitled, if, after execution, the document had been accidentally lost or destroyed". The Allahabad, Calcutta and Patna High Courts have adopted a different line of approach to the question whether when once the conveyance has been executed in pursuance of the contract the plaintiff can, so long as the document has not been registered, bring a suit for specific performance. In *Amerchand* v. *Nathu*[5], a sale deed had been executed, but the executant, a lady, had refused to register it. No suit was brought for the compulsory registration of the document. Nevertheless it was held that the plaintiff was entitled to specific performance. In *Surendra Nath Nag Chowdhury* v. *Gopal Chunder Ghosh*[6], Mukherjee and Carnduff, JJ., observed: "Although a document which has been executed, is inoperative in law and wholly ineffectual to create title in the intended lessee, it is nevertheless evidence of a valid agreement to execute a lease and may consequently form the foundation for an action for specific performance." The argument was that the undertaking of a person agreeing to transfer immovable property is to do everything whereby an operative agreement in law can be effected, that he has not done everything if he has failed in an instrument where the obligation is cast upon him to obtain its registration, and therefore a step in the creation of the legal relation of transferor and transferee being wanting one can compel the person who has not taken that step to take it. In *Nasiruddin Midda* v. *Sidhoo Mia*[7], one of the parties to a document refused to acknowledge the right to have it registered. The plaintiff thereupon sued to enforce registration and alternatively for specific performance. After rejecting the first claim as barred under section 77 of the Registration Act, the Calcutta High Court observed apropos of the alternative claim : "As regards the alternative claim to enforce specific performance of the agreement to sell there was really no answer to the suit. Although the vendors had executed the document, they could not be deemed to have completely performed their part of the agreement. The agreement was in essence not merely to execute a conveyance which

1. (1896) 6 M.L.J. 263.
2. (1952) 1 M.L.J. 620.
3. (1869) 5 M.H.C.R. 123.
4. (1897) I.L.R. 20 Mad. 19.
5. (1910) 7 All. L.J. 887.
6. (1910) 12 Cal. L.J. 464.
7. (1918) 44 Ind. Cas. 361.

until registered would be inoperative in law to transfer the full title from themselves to the plaintiff as purchaser. Such title could be transferred only by means of a registred instrument; consequently the execution of a conveyance not followed by registration could not be regarded as fulfilment of the contract". All these decisions were fully considered in *Satyanarayana* v. *Chinna Venkata Rao*[1]. There, on the vendor denying execution of the sale deed, the Sub-Registrar refused to register the deed presented by the purchaser for registration. It was held that the sole remedy of the purchaser was to file a suit as provided in the Registration Act within the thirty days allowed by section 77 and not to file a suit for specific performance by the execution of a new sale deed and delivery of possession. Referring to the Allahabad and Calcutta decisions, Coutts Trotter, C.J., said: "It seems to me that these decisions in Calcutta and Allahabad in effect take upon themselves by a side wind to get rid of the period of limitation strictly imposed by the express words of the statute. To my mind no judicial decision has any right to tamper with a thing directly enforced and enjoined by a statute whose construction is free from possible doubt. The most that can be said is that the remedy given by the statute is not intended to be the only one. It is almost impossible to believe that the Legislature can have intended that there should be a direct and indirect way of effecting the same thing and that the period of limitation applicable to them should be entirely different". The learned Chief Justice added : "How it can be said that a man who is given an express statutory remedy by an act of Legislature under section 77 of the Registration Act and has failed to take advantage of it, has not been guilty of laches and is entirely free from blame passes my comprehension. It appears to me that a man who has failed to adopt the remedy expressly provided by the statute cannot come to this Court and ask for the exercise in his favour of a discretionary and equitable remedy". The last observation would suggest that where for any reason the remedy provided by the Registration Act is unavailable, then, possibly, there would be justification for seeking the Common Law remedy. In *Balkishen Das* v. *Bechan Pandey*[2], the Allahabad High Court maintained its earlier view and held that where a person enters into a contract to sell certain immovable property and executes a sale deed but abstains from getting it registered, section 77 of the Registration Act does not provide the only exclusive relief to the other party and that the latter is entitled to enforce specific performance of the contract. A similar view was expressed in *Jhaman* v. *Amrit*[3] by the Patna High Court. Fazl Ali, C.J., said : " In my opinion in a case like the present there are two alternative remedies available to the plaintiff. It is open to him either to bring a suit under section 77 of the Registration Act merely for the registration of the document, and if he chooses to adopt that course, that suit must be brought within thirty days of the date when the Registrar refuses to register the document. It is equally open to him to have recourse to the further and more comprehensive remedy provided by a suit for the specific permormance of the contract of sale". In *Venkatasubbayya* v. *Venkatarathnamma*[4], the modification of the strict doctrine favoured in *Venkatasami's case*[5], made in *Satyanarayana's case*[1], by holding that where it is not possible for the party to resort to proceedings under the Registration Act an independent suit for specific performance may lie, is taken a step further. It is held that where a party has set in motion the machinery for enforcing the registration of the deed of transfer no suit for specific performance can be brought; but it would be a different matter if the unregistered document is sought to be read as evidence of a contract in a suit for specific performance if the party had not set in motion the machinery provided by the Registration Act under sections 72 to 76. When once the machinery has been set in motion the logical conclusion is that action should be taken under section 77 before any suit for specific performance could be thought of. It was also held that the amendment to section 49 of the Registration Act by Act XXI of 1929 by adding the proviso to the section that an unregistered document affecting immovable property and required to be registered may be received as evidence of a

1. (1925) 50 M.L.J. 674 : I.L.R. 49 Mad. 302.
2. (1931) I.L.R. 54 All. 68.
3. (1945) I.L.R. 24 Patna 325.
4. (1954) 1 M.L.J. 396 : I.L.R. (1954) Mad. 775.
5. (1893) 3 M.L.J. 169 : I.L.R. 16 Mad. 341.

contract in a suit for specific performance, *etc.*, does not affect the position. In the instant case, after the execution of the sale deed by the second and third defendants to the plaintiff it became known that the second defendant had executed another sale deed in favour of the first defendant but with an earlier date. In view of trouble which might arise on that account the third defendant presumably with the consent of the plaintiff had made an endorsement in the sale deed in favour of the plaintiff that "should any dispute arise in respect of this it shall not concern us". The effect of it was that the plaintiff by consenting to it was really releasing the third defendant from his obligation under the law. The second defendant cannot however be affected by it. The registration authorities refused to register the document because there was a material alteration. The question then arose whether the plaintiff was entitled to specific performance of the contract as against the second defendant on the finding that the sale deed executed by the second defendant in favour of the first defendant had been *antedated*. According to the precedents in Madras, the machinery of registration having been put in motion, the suit can only be under section 77 of the Registration Act and not independently for specific performance. It was however held that a suit for specific performance will lie in the circumstances of the case. It was pointed out that, if for any reason it becomes impossible to obtain registration after resort to such proceedings or because of other circumstances which prevent any resort to such proceedings under the Registration Act, the vendee is entitled to sue for specific performance of the agreement to sell in his favour, though being an equitable remedy the Court has discretion to decline to award such relief, as where a vendee has neglected to present the sale deed for registration while he is in custody of it within the time prescribed and thereby loses his right to have it registered. It would thus seem that a suit for specific performance of the agreement to sell may be brought not only where the registration of the sale deed by the plaintiff has become impossible due to accident, loss or destruction of the document while in the plaintiff's custody but also even in cases where the machinery of registration has been set in motion provided that the plaintiff has not been guilty of such conduct as would preclude him from obtaining the relief of specific performance.

MADALA THATHIAH *v.* UNION OF INDIA, (1956) 2 M.L.J. 584.

This case deals with more points of interest than one. It accepts the principle that in regard to tenders the position is that a tender to supply goods up to a certain quantity at a certain price amounts to an offer to supply on those terms if and when the offeree places an order and *qua* that order creates a binding contract; that, even if the probable quantity which may be required has been specified in the invitation to tender the offeror has no remedy if the offeree does not give any orders at all or fails to order up to the specified quantity, although the offeror will be bound to deliver the specified goods as and when ordered by the offeree; and, that, if the invitation to tender had not expressed merely a maximum or limit but was for a specified quantity of goods, no more and no less, the acceptance of the tender becomes an acceptance in the legal sense and creates an obligation binding the tenderer to deliver and the acceptor of the tender to accept the delivery. The instant decision also holds that where there are two clauses in a contract totally repugnant to each other, the former clause alone is to be received and the latter is to be rejected. In *Furnivall* v. *Coombes*[1], it was held that a proviso which is in terms wholly repugnant to a covenant creating a personal liability is void. But if the proviso only limits the personal liability without destroying it, the proviso will be valid, *Williams* v. *Hathaway*[2]. Whether it is the one or the other will be essentially a question of fact. In *Forbes* v. *Git*[3]., Lord Wrenbury observed: "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the latter. Thus if *A*

1. (1843) 5 Man. & G. 736 : 134 E.R. 756.
2. L.R. (1877) 6 Ch. D. 544.
3. L.R. (1922) 1 A.C. 256, 259 (P.C.).

covenants to pay £ 100 and the deed subsequently provides that he shall not be liable under his covenant, that later provision is to be rejected as repugnant and void for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus if *A* covenants to pay £ 100 and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner prescribed. *Furnivall* v. *Coombes*[1] is an illustration of the former case: *Williams* v. *Hathaway*[2] is an illustration of the latter". Thus the later clause will be regarded as a limitation only if it provides for contingencies subject to which the covenant may be enforceable. The contingency naturally must be certain and objective and should not be the expression of a whim or fancy of the party. In *New Zealand Shipping Co.* v. *Societie des Ateliers et chantieres de France*[3], it was remarked by Lord Atkinson: "Of course, the parties may expressly or impliedly stipulate that the contract shall be voidable at the option of either party to it". But the avoidance can only be for valid reasons and cannot be arbitrary. In *Chunilal Dayabhai & Co.* v. *The Ahmedabad Fine Spinning and Weaving Co., Ltd.*[4], the defendants had contracted with the plaintiffs to supply manufactured piecegoods subject to the condition that if the defendants were not in a position to deliver the goods or did not give delivery for any reason, the plaintiffs could only treat the contract as cancelled but could not ask for damages for the breach. The stipulation was: "to cancel or not to cancel the sold goods for any reason depends on you." The defendants having failed to fulfil the contract, the plaintiffs sued them in damages. It was held by Mulla, J., that the stipulation only conferred on the plaintiffs power to determine the contract if they could give good reasons for so doing and that the defendants were bound to justify their refusal to perform the contract inasmuch as they could not themselves bring about the state of affairs which would avoid the contract. It is thus clear that parties to a contract may even stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency. The only thing objectionable is where the proviso or later clauses seeks altogether to destroy the obligation under the earlier clause.

PERUNDEVI AMMAL *v.* AMAVASIKAN, (1956) 2 M.L.J. 610.

This is more than a mere copy book decision. In view of the provision in the Hindu Marriage Act of 1955 for judicial separation as a matrimonial relief the effect of resumption of cohabitation between the spouses after a decree for separate living and maintenance is bound to be a matter of great importance. It has been tersely stated by Lord Eldon that reconciliation after a separation entirely did away with the effect of it, *Bateman* v. *Olivia, Countess of Ross*[5]. It renders ineffective any previous order for alimony. The amounts payable periodically under an order for alimony are not payments of a life annuity but are liable to be stopped at any moment if the husband and wife returned to cohabitation, *Linton* v. *Linton*[6]. In *Haddon* v. *Haddon*[7], an order had been made under section 4 of the English Matrimonial Causes Act, 1878, by the Justices of the County of Leicester that the wife should no longer be bound to cohabit with the husband and that he should pay her a weekly sum for her maintenance. Subsequent to the order the wife resumed cohabitation with the husband. Hawkins, J., held that the resumption of cohabitation had the effect of annulling the alimony order. He said: "It is impossible to suppose that the Legislature, in giving Magistrates power to release a wife from the obligation of cohabitation by reason of imminent danger from her husband's violence intended to confer upon them jurisdiction to make an order which should give a wife liberty to live apart from and resume cohabitation with

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1. (1843) 5 Man. & G. 736 : 134 E.R. 756.
2. (1877) L.R. Ch. D. 544.
3. L.R. (1919) A.C. 1 (P.C.).
4. (1921) I.L.R. 46 Bom. 806.
5. (1813) 1 Dow. 235 : 3 E.R. 684.
6. (1885) 15 Q.B.D. 239.
7. (1887) 18 Q.B.D. 778.

her husband when and as often as she should think fit, and compel her husband to maintain her at all times when it pleased her to separate from him, even though her safety no longer required a separation.'" As remarked by Gorrel Barnes, J., the resumption of cohabitation puts an end to the cause of complaint justifying the ordering of alimony by reason of the principles of Common Law, *Williams* v. *Williams*[1]. In *Ellen Ma Noo* v. *William Po Thit*[2], a decree for judicial separation was passed in 1903 in favour of the wife which embodied an order for the payment to her of permanent alimony. The wife lived apart from the husband till February 1, 1907. Thereafter she returned to him and they lived together for over fourteen years. Subsequently the wife once again left the husband and applied for the execution of the decree for alimony obtained by her in 1903. It was held that in the circumstances she could not execute that decree and that if she desired to obtain an order for maintenance or alimony she should institute fresh proceedings. In *U Po Shein* v. *Ma Sein Mya*[3], it was held that a *bona fide* reunion removes the basis on which the order for maintenance rests and therefore as vacating the order. A different note was sounded in two decisions in India. In *Kanagammal* v. *Pandara Nadan*[4], a wife obtained a maintenance order under section 488, Criminal Procedure Code and subsequently returned to the husband. It was held that the maintenance order was not thereby put an end to but that its operation was merely suspended during the period of cohabitation. This view was followed in *Pearey Lal* v. *Naraini*[5]. In *Venkayya* v. *Raghavamma*[6], however, Leach, C.J., dissented from this view and observed: "I can see no difference in principle between an order passed under section 488 of the Indian Code of Criminal Procedure and an order under the Matrimonial Causes Act of 1878 or the English Summary Jurisdiction (Married Women) Act, 1895. If the principle stated by Lord Eldon is to be applied there can be no question of the suspension of the order. The order goes entirely". The reason is that the very basis on which the order had been obtained had been demolished and the cause of action did not survive in order to enable a continuous enforcement of the order. If, however, arrears of maintenance had become payable before the parties resumed cohabitation subsequently to the passing of the maintenance order, the right to recover such arrears will not be lost. In *Singaravelu* v. *Pattammal*[7], an unconditional decree had been obtained by the wife against her husband. She was alleged to have become unchaste subsequent to the passing of the decree. It was held that she can recover the arrears of maintenance under the decree and that the husband's remedy on the allegation can only be by way of a separate suit and not by way of objection to the execution of the unconditional decree. Referring to the observations of Leach C.J., in *Venkayya's case*[6], Rajamannar, C.J., said : "It is not difficult to sustain the decision in this case on a principle analogous to the satisfaction of a decree. The husband who was bound to maintain the wife was directed by the decree to pay her a certain sum of money towards her maintenance. If, subsequently, she herself came and lived with him and he maintained her there would be *pro tanto* a satisfaction of the decree. Apart from that, in that case, there was no dispute as to facts and there was nothing which made it incumbent on the executing Court to make an enquiry into new allegations made in the course of execution proceedings ". In the instant case, a Hindu wife had obtained a decree for separate maintenance on the ground of cruelty, neglect and abandonment, and of his keeping a concubine. Later on the parties resumed cohabitation and lived together and the wife gave birth to a child as a result thereof. In those circumstances it was held that the maintenance decree was wiped off, that the mere resumption of cohabitation had that effect, and it was unnecessary to show that the causes which had led to the passing of the decree had also become removed. The instant decision follows fully the principles of English law on the matter.

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1. L.R. (1904) P. 105.
2. (1924) I.L.R. 2 Rang. 163.
3. (1930) I.L.R. 8 Rang. 460.
4. (1926) 52 M.L.J. 176 : I.L.R. 50 Mad. 663.
5. (1935) I.L.R. 58 All. 379.
6. (1941) 1 M.L.J. 263 : I.L.R. (1942) Mad. 24.
7. (1948) 2 M.L.J. 519 : I.L.R. (1949) Mad. 613.

SAKHARAMA RAO *v.* NAGASAMI RAO, (1957) 1 M.L.J. 3.

Section 38 of the Contract Act provides that an offer to one of several joint promisees has the same legal consequences as an offer to all of them. But tender of a money debt does not discharge the debt. In regard to the right to give a discharge the material section is section 45 which deals with the devolution of rights where a person has made a promise to two or more persons jointly. The section has however little light to afford in regard to the effect of payment to one of several joint promisees. Section 165 provides that if several joint owners of goods bail them, the bailee may deliver them back to one joint owner without the consent of all in the absence of any agreement to the contrary. This provision concerns property and does not bear on debts. The decision in *Wallace* v. *Kelsall*[1], supports the view that payment to one of the joint promisees will constitute a valid discharge of the debt. The authority of this decision has however been shaken by the decision of Farwell, J., in *Powell* v. *Brodhurst*[2]. In India, in *Barber Maran* v. *Ramana*[3], the Madras High Court has, relying on the earlier English decision, and the language of section 38 of the Contract Act, held that a release of the mortgagor by one of two mortgagees on payment to him of the mortgage debt discharges the mortgagor as against the other mortgagee. In *Annapuranamma* v. *Akkayya*[4], this decision was approved and it was held that one of several payees of a negotiable instrument can give a valid discharge of the entire debt but that if the promisor had merely undertaken to pay the debt at a future date that will not be equivalent to a discharge. Similarly in *Ramaswami* v. *Chandra Kotayya*[5], it was affirmed that an undertaking given by a mortgagor subsequent to the date of the mortgage to pay the amount due to one of two co-mortgagees is not equivalent to discharge of the mortgage, and that to amount to an actual discharge there must be either payment to one of the joint mortgagees or the other mortgagee must consent to the mortgage being superseded by the subsequent undertaking. The view thus consistently taken in Madras has not been accepted by the other High Courts, *Sheikh Hakim* v. *Advaita Chandra Das Dalal*[6]; *Shyam Lal* v. *Jagannath*[7]. In view of this conflict of judicial opinion on a matter of great practical importance, it is desirable that the law should be settled by a decision of the Supreme Court. In the instant case, by arrangement among the parties one of two co-mortgagees was allowed to be in possession of the mortgaged property, receive the income and appropriate it towards the principal and interest due. It was found that the income so received from the property during the period of such possession was more than sufficient to discharge the entire debt, principal and interest due on the mortgage. The mortgage was thus discharged not by actual payment but by the co-mortgagor being allowed to be in possession and appropriate the income. It was held that here the payment must be deemed to be actual, though not in cash but by way of appropriation of income, and that it was thus a payment to a joint promisee within the meaning of section 45 of the Contract Act and would be a valid discharge of the mortgage debt.

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1. (1840) 7 M. & W. 264.
2. L.R. (1901) 2 Ch. 160.
3. (1897) 7 M.L.J. 269 : I.L.R. 20 Mad. 461.
4. (1913) 21 M.L.J. 333 : I.L.R. 36 Mad. 544 (F.B.).
5. (1924) 47 M.L.J. 840 : I.L.R. 48 Mad. 693.
6. (1918) 22 Cal. W.N. 1021.
7. A.I.R. 1937 All. 527 : (1937) All. L.J. 395.

DEOKI NANDAN *v.* MURLIDHAR, (1957) 1 M.L.J. (S.C.) 28.

This is an instructive decision on the question as to who are the beneficiaries when a temple is built, idol installed and properties endowed therefor, and as to when the institution is to be regarded as a public or private temple. It is now well-settled that an idol is a juristic entity and that it can own property though only in an ideal sense, *Prosonno Kumari Debya* v. *Golab Chand Baboo*[1], *Maharaja Jagadindranath Roy* v. *Rani Hemanta Kumari Debi*[2], *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*[3]. In the last of these cases Lord Shaw observed: "A Hindu idol is according to long established authority.... a juristic entity. It has a juridical status, with the power of suing and being sued. Its interests are being attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would in such circumstances on analogy be given to the manager of the estate of an infant heir". He added: "The duties of piety from the time of the consecration of the idol are duties to something existing which, though symbolising the divinity, has in the eye of the law a status as a separate *persona.* The position and rights of the deity must, in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being". A gift to the temple or idol is thus essentially for its benefit. But as suggested by Jenkins, C.J., in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*[4], the dedication to the deity is only a compendious expression of the pious purposes for which the dedication is intended. The true purpose of a gift of properties to the idol is to acquire spiritual benefit by providing opportunities and facilities for those who desire to worship. As pointed out in *Hindu Religious Endowments Board* v. *Veeraraghavachariar*[5] the purpose of making a gift to a temple is not to confer a benefit on God but to confer a benefit on those who worship in that temple by making it possible for them to have the worship conducted in a proper and impressive manner. The true beneficiaries are thus the worshippers. They are, however, beneficiaries only in a spiritual sense, *Narayanaswami Gurukkal* v. *Irulappa*[6], *Vidyapurna* v. *Vidyanidhi*[7]. Their interest lies in seeing that the worship or service is properly conducted and that their spiritual wants are properly ministered to.

An institution is public if it is constituted for the benefit either of the public at large or of some considerable portion of it answering to a particular description. In private trusts, the beneficial interest is vested absolutely in one or more individuals who are or within a certain time may be, definitely ascertained, see *Nabi Shirazi* v. *Province of Bengal*[8]. In a private trust the beneficiaries are specific individuals; in a public trust they are the general public or a class thereof. Also, in the former the beneficiaries are ascertained or capable of being ascertained, but in the latter they are incapable of ascertainment. The Supreme Court has reaffirmed these principles in the decision under review.

C. D. VENKATARAMAN, *In re*, (1957) 1 M.L.J. 26.

It is now well established that the powers of the High Court under Article 226 of the Constitution are very wide. The underlying purpose of the jurisdiction is the satisfactory furtherance of justice. The existence of an alternative relief available to a party need not fetter the exercise of the jurisdiction in an appropriate case. Where a taxing statute, for instance, is challenged, it has been held that the High Court will not refuse relief on the ground of an alternative remedy being available to the party, *Raghbir Singh* v. *Municipal Board of Hardwar Union*[9]. In *Subramanian Chettiar* v. *R. D. O., Devakottah*[10], it was stated : "It is well settled now, by decisions of the Supreme Court and the High Courts, that there is no absolute bar to entertaining writ petitions, and issuing a

1. (1875) L.R. 2 I.A. 145, 152 (P.C.).
2. (1904) L.R. 31 I.A. 203 (P.C.).
3. (1924) 49 M.L.J. 30 : L.R. 52 I.A. 245 (P.C.).
4. (1910) I.L.R. 37 Cal. 128 (F.B.).
5. A.I.R. 1937 Mad. 750.
6. (1902) 12 M.L.J. 355, 358.
7. (1904) I.L.R. 27 Mad. 435, 451.
8. I.L.R. (1942) 1 Cal. 211, 227, 228.
9. A.I.R. 1956 All. 324.
10. (1956) 2 M.L.J. 126, 131.

writ even when there are alternative remedies, when these alternative remedies are in the opinion of the Court, not effective, speedy, sufficient or adequate ". In that case the properties of the petitioners were about to be attached and sold for stamp duty and penalty for recovering the amount as arrears of land revenue under section 48 of the Stamp Act and warrants were issued or were about to issue. In the circumstances it was held that there was no point in taking to the alternative remedies available as they would neither be speedy nor effective nor adequate to grant relief, and therefore relief under Article 226 might be granted. In *Krishna Iyer* v. *State of Madras*[1], the Court observed that even the existence of *effective* alternative remedies is by itself no bar to the assumption of jurisdiction under Article 226, though normally it is a very relevant factor which the Court will take into consideration in deciding whether the jurisdiction vested in the Court under Article 226 will be exercised in a given case. In *Noor Mohamed and Co* v. *State of Madras*[2], it is made clear that the exercise of the jurisdiction under Article 226 is essentially a matter of discretion and the existence of alternative remedies is not an absolute rule of law barring jurisdiction. In that case it was found that the questions raised were of great importance and complexity and that if the point made by the assessee were upheld it would mean that Rule 5 of the General Sales Tax Rules was invalid, and that would not be a ground which the assessee could put forward before the Tribunals constituted under the Act, and, therefore, relief could be sought under Article 226. The instant decision reaffirms the position as to the scope of Article 226. It also poses the question whether a rule requiring the previous permission of the Head of a Department before a Government servant could resort to proceedings under Article 226 will not be invalid in view of the Article granting the right to every citizen, which term will include Government servants also.

SYAMALAMBAL *v.* NAMBERUMAL CHETTIAR, (1957) 1 M.L.J. 118.

This case deals with a question of tort. There are two actions having superficially some resemblance but really characterised by substantial points of difference. These are actions for abuse of civil process and actions for trespass to property. The former action is like an action for malicious prosecution in that the plaintiff has to prove the absence of a reasonable and probable cause. The plaintiff has also to prove malice on the part of the defendant. In an action for trespass it is sufficient if the plaintiff proves the act of trespass and no proof of malice is required either. It is for the defendant in such an action to prove a good cause or excuse for his action. Where property is wrongfully attached and a person claims damages on that ground the question has arisen as to whether the action lies in trespass or as abuse of civil process. According to *Kissorimohun Roy* v. *Harsukh Das*[3], no proof of malice or want of reasonable care is necessary where the property of a person who is not a party to a suit has been wrongly attached, and in such cases the action is really one founded in trespass and no proof of special damage is needed. In *Srinivasayya* v. *Lakshmayya*[4], it was argued that an attachment of immovable property will stand on a different footing; that, under the law attachment of immoveable property merely operates as a prohibition of alienation by the person against whom the order is made; that there is nothing in the attachment to fetter the rights of the real owner if he is not the defendant or a party sought to be proceeded against: that at best, there might be cast a cloud upon his title which could be set right by proceeding under Order 21, rule 58, Civil Procedure Code, and, that, therefore there is nothing in the nature of trespass nor anything which causes damages to the real owner. The point was not decided though the learned Judge seemed inclined to hold that when the property of a person not a party to a suit is wrongly attached the action would be one founded on trespass. In the instant case the act of attachment though wrongful was only technically so. The learned Chief Justice makes it clear that a claim for damages for wrongful attachment of property can fall under two heads, trespass

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1. (1956) 2 M.L.J. 179, 181.
2. (1956) 2 M.L.J. 374, 383.
3. (1889) L.R. 17 I.A. 17 : I.L.R. 17 Cal. 436 (P.C.).
4. (1938) 1 M.L.J. 73: I.L.R. (1938) Mad. 180.

or abuse of civil process ; that where property of a person not a party to the suit is attached wrongly the action is one grounded on trespass ; but that where the attachment complained of was under judicial sanction though at the instance of a party the remedy is an action for abuse of process ; and in such a case the plaintiff has to prove the absence of reasonable and probable cause as well as malice on the part of the defendant. On the finding that the defendant had a reasonable excuse for attaching the properties in the hands of the plaintiff it was held that the defendant had established a good plea in defence whether the action was treated as one for trespass or as one for abuse of civil process.

SUBRAMANIAM CHETTIAR *v.* MUTHIAH PILLAI, (1957) I M.L.J. 147.

This case deals with the question whether there is a period of limitation for an application by a mortgagor-plaintiff in a redemption suit to pass a final decree. Under Order 34 of the Civil Procedure Code, if the mortgagor claiming redemption has failed to deposit the amount on or before the date specified by the preliminary decree, extension of time for payment may be asked for under rule 7 (2). Rule 8 (3) provides that the mortgagee may apply for a final decree debarring the plaintiff from all right to redeem the property in case the mortgagor had failed to deposit the amount by the date fixed in the preliminary decree. The question whether a mortgagor who had not sought extension of time for payment under rule 7 (2) can, taking advantage of the mortgagee's failure to apply under rule 8 (3) to bar the right of redemption, deposit the amount at any time after the date set in the preliminary decree and thereafter apply for the passing of a final decree for redemption presents no doubt a piquant problem but has been considered and dealt with in *Angammal* v. *Muhammad Sulaiman Lebbai*[1]. The conclusion in the case shows that law always favours the vigilant and that where the mortgagee has not taken action in the manner directed by the law the mortgagor is entitled to take advantage of such inaction. In that case, the preliminary decree for the redemption of a usufructuary mortgage had been passed on October 15, 1935 and the time fixed for payment by the mortgagor was January 15, 1936. The mortgagor did not deposit the amount nor did she apply for extension of time for payment. She actually deposited the amount nearly 6 years later at the end of 1942, and applied on February 2, 1943 for the passing of a final decree for redemption under Order 34, rule 8 with a direction to the mortgagee to render possession of the property to the plaintiff. The Court held that the mortgagor had a right to deposit the money so long as a final decree debarring her right of redemption had not been passed under rule 8 (3) on the application of the mortgagee, that she was not bound to apply for extension of time under rule 7 (2), and that her failure to do so will not preclude her from taking advantage of the mortgagee's inaction. In that view the plaintiff's application for the passing of a final decree was held to be in time. In the instant case it is pointed out that for such an application the cause of action arises on the actual payment or deposit of the amount fixed by the preliminary decree, that the period of limitation for such an application is governed by Article 181 of the Limitation Act, and that the period will be three years from the date of the deposit

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KADAN KUNHIKANNAN, *In re*, (1957) I M.L.J. 151.

Section 243, Criminal Procedure Code, provides that on admission by the accused that he has committed the offence with which he is charged and on his failing to show sufficient cause why he should not be convicted, the Magistrate may convict him accordingly. If, however, the Magistrate does not so convict, or if the accused does not admit the guilt in the first instance, the Magistrate shall under section 244 proceed to hear the complainant and take all such evidence as may be produced by the prosecution, and also hear the accused and take all such evidence as he may produce in his defence. There is nothing in the section which precludes the accused from pleading guilty when he is heard after the prosecution evidence has been taken though he may have in the first instance plead-

1. (1945) 2 M.L.J. 239.

ed not guilty. Nor is there anything in the section precluding the Magistrate from accepting such plea of guilty made at that stage and sentence him. Where however, the accused had in the first place pleaded not guilty and denied the offence, but on an adjourned date put in a signed statement admitting his guilt and the Magistrate thereupon got it confirmed by questioning him, the position will be different. Under section 244 a Magistrate can question the accused for a second time where he denied the offence originally, only after hearing the complainant and taking the evidence by the prosecution. When once the accused had denied the offence the Magistrate should proceed in the manner provided in section 244 and cannot again question the accused merely because on the adjourned date he chose to put in a statement admitting his guilt. It has been so held in *David Chellayya* v. *State*[1]. In the instant case, it was only after the procedure prescribed by section 244 had been gone through that the accused was questioned and made his admission of guilt. In the circumstances, it was held that such hearing of the accused for the second time after his initial denial of the offence was not improper and did not in any way contravene the provisons of the Criminal Procedure Code.

I.S. VASUDEVA BHAT, *In re*, (1957) 1 M.L.J. 165.

This case deals with the interesting question whether in a prosecution of an employer for failure to reinstate a dismissed employee in accordance with the order of the Commissioner of Labour under the Madras Shops and Establishment Act (XXXVI of 1947), the question of the legality of the dismissal can be gone into. Section 41 (1) of the Act lays down the procedure to be followed by the employer before he terminates the service of an employee. Clause (2) provides for a right of appeal to the Commissioner of Labour. Under clause (3), the decision of the appellate authority is final and shall be binding on both the employer and the employee. The question is whether such provision precludes the correctness of the Labour Commissioner's order from being challenged in any other proceedings. There are similar provisions in other enactments postulating finality in respect of decisions of statutory bodies with reference to which courts have considered how far such finality affects the jurisdiction of the civil Courts to go into the legality of the decisions. Even in regard to the acts of Government under statutory authority, it has been held from early times that a civil Court can give relief if the impugned act is *ultra vires* notwithstanding any bar of the Court's jurisdiction enacted in the statute. Thus, for instance, section 58 of the Madras Revenue Recovery Act prohibits the civil Courts from taking cognisance of suits involving the consideration or decision of any question regarding the rate of land revenue payable to Government or the amount of assessment that may be fixed. It has been held that such a bar will not affect the Court's jurisdiction to decide whether or not the land or the person is at all under liability to be assessed to land revenue, or, in other words whether the act of the Government is *ultra vires*, *Madathapu Ramayya* v. *Secretary of State for India*[2]. A similar rule governs the acts of statutory bodies. In *Smith*, In re[3] in a prosecution for the offence of non-payment of the license fee payable for erecting a machinery under section 288 of the Madras City Municipal Act, the fact that the accused had not appealed to the Standing Committee against the imposition of the fee and thereby such imposition had been allowed to become final was held not to preclude the accused from raising the plea that the machinery was not one in respect of which a license fee was required, and that he was therefore not liable to pay the same. This decision was followed in *Chairman, Municipal Council, Chidambaram* v. *Thirunarayana Iyengar*[4]. In the course of his judgment, Devadoss, J., said: "I have no hesitation in holding that, when an act is *ultra vires* a statutory body....the Court which is asked to convict a person for the violation of the order of the statutory body is not prevented from considering the legality of the order." In that case a prosecution had been launched under section 338 (*b*) of the Madras District Municipalities Act against a Coffee Hotel keeper for carrying on the business after the cancellation

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1. A.I.R. 1957 Trav.-Co. 89.
2. (1903) I.L.R. 27 Mad. 386.
3. (1923) 45 M.L.J. 731.
4. (1927) 55 M.L.J. 566 : I.L.R. 51 Mad. 876.

of his license for a reason other than the contravention of the terms of the license. The question was raised whether the Chairman's order cancelling the license can be canvassed in the prosecution as an *ultra vires* act of the Chairman and it was held that it can be done. In *Ramaswami Iyengar* v. *Sivakasi Municipality*[1], the question was whether under the Madras District Municipalities Act which had provided that under certain conditions where an assessment to profession tax had not been challenged or after objection the assessment had been confirmed, the aissessemnt shall be treated as final, the legality of the levy can be examined by the Court in a prosecution against the assessee for non-payment of the tax. It was laid down that the finality of the assessment order under the Act was only for the purposes of the Actand would not prevent a person from impeaching the legality or validity of the assesment in a Civil Court and that a different principle cannot apply in the case of a criminal prosecution. In *Public Prosecutor* v. *Kondappa*[2], also, a person was prosecuted for non-payment of profession tax due to a District Board. The assessee had failed to appeal against the assessment within the prescribed time and the assessment had thus become final. It was held that despite this fact the validity of the assessment can be examined in the prosecution proceedings for the non-payment of the assessment amount. The principle is that cases of fundamental departures from the meaning of the statute should be deemed to be excluded from the operation of the bar of finality. Yahya Ali, J., observed : "There cannot be the slightest doubt as regards the position that where the legality of the assessment is questioned or where it is contended that the assessee is not taxable at all, then the assessment has no legal existence, and it would be open to him in a civil suit to question the legality of the assessment notwithstanding rule 31...... *A fortiori* would such a right be available to an accused person in a criminal proceeding". These decisions were followed in *Narasingamuthu Chettiar*, In re[3] which was a case of prosecution for non-payment of tax under the General Sales-Tax Act which in section 11 (4) had provided that every order, pending appeal under that section, shall be final. In the instant case, applying these principles it was held held that notwithstanding the provision in section 41 (3) of the Shops and Establishments Act giving finality to the order of the Commissioner of Labour it is open to the Court to go into the question whether the act of the accused constitutes an offence or not. In fact under the concerned enactment while in regard to decisions under one section, section 51, it is expressly provided that the decisions of the Commissioner shall be final and not be liable to be questioned in any Court of Law, there is no similar provision shutting out the Court's jurisdiction in regard to decisions of Commissioner of Labour under other sections, like section 41.

PONNUSWAMI CHETTIAR *v.* VELLAIMUTHU CHETTIAR, (1957) 1 M.L.J. 179.

This decision holds that the absence of the name of the payee in a promissory note will not *per se* make the instrument invalid when the payee was known to the maker of the note with certainty even at the time of the execution of the instrument. In *Abdul Hakim* v. *Ebrahim*[4], two promissory notes had been executed on March 27, 1915, in favour of one Abdul Hakim Ear Mahomad by the defendants. A suit was instituted by the plaintiff for recovering the amounts due under the note, on the assumption that he was the payee under the notes. The defendants contended that the payee was a different entity altogether, a firm which bore the same name as that of the plaintiff. In holding that the plaintiff cannot sue on the notes, the Court said : " The defendants urge that the notes were given, not to the plaintiff but to a firm which happens to possess the same name as the plaintiff. This raises a question, not of benami, but of the identity of the person to whom the note was given ; and the plaintiff cannot succeed till the matter has been determined in his favour ". In the instant case, the promissory note recited the name of the payee as " son of A. Palaniyandi Chettiar ". A particular son was known to have advanced the sum of Rs. 1,000 to the maker of the note which was also the amount for which the note had been executed. Following the principle laid down in the Calcutta

1. 1936 M.W.N. 221.
2. (1947) 1 M.L.J. 317.
3. (1948) 2 M.L.J. 221.
4. (1920) 32 Cal.L.J. 132.

case it was held that section 92, proviso 6 of the Evidence Act will enable evidence of the identity of the payee being let in.

NATARAJAN *v.* REGIONAL TRANSPORT OFFICER, CHINGLEPUT, (1957) 1 M.L.J. 233, V. C. K. BUS SERVICE, LTD. *v.* REGIONAL AUTHORITY, COIMBATORE, (1957) 2 M.L.J. (S.C.) 43.

Both these decisions affirm that when a permit is renewed under the Motor Vehicles Act, it is a continuation of the original permit and not the grant of a fresh one; so much so, the transport authorities can cancel or suspend the latter for breach of the conditions committed during the currency of the original permit. The second of the decisions further holds that even assuming that the renewed permit is not a continuation of the original permit, it is subject to the implied condition that it is liable to be cancelled if the original permit is cancelled. The term 'renewal' means literally a transformation to new life, invigoration, regeneration, revival, substitution, or beginning again. This would suggest that though ordinarily there is the element of continuity it also involves the idea of substitution or replacement. In *Sharp* v. *Wakefield*[1] on an appeal from an order of refusal to renew a license for the sale of intoxicating liquors, Lord Bramwell observed: "The license is a renewal. That word has been criticised. It may be misleading, but is I think, correct. It is a 'renewal' *i.e.*, a new license." The decision emphasises that renewal is not as a matter of course, and, in that sense, the renewing of a license is tantamount to the grant of a new license. Turning to the provisions of the Motor Vehicles Act, section 58 (1) provides that a permit other than a temporary permit issued under section 62 shall be effective without renewal for such period not less than three years and not more than five years as the Regional Transport Authority may in its discretion specify. According to section 58 (2) a permit may be renewed on an application made and disposed of as if it were an application for a permit: Provided that other conditions being equal an application for renewal shall be given preference over new applications for permits. The language of clause (2) suggests that notwithstanding the proviso a renewal when granted is granted on an independent consideration of the merits and that it cannot be distinguished from a fresh grant. There is also the further fact that, in law, a renewal implies, as for instance, in the case of a lease, that the original terms are not disturbed; but, on the other hand, in the case of renewal of a bus license it would be open to the authorities to impose new conditions and modify the original terms; hence the use of the word 'renewal' should not lead to the inference that it was the original permit that was being continued. In *Mahabir Motor Co.* v. *Bihar State*[2], the Court made an observation that both grant and renewal stand on more or less the same footing by reason of the provisions of sections 47, 57 and 58 of the Motor Vehicles Act; but the observation was only with reference to the question whether an appeal will lie against an order granting a renewal in view of the specific provision in section 64 providing for an appeal from an order granting a permit. The implication of the term 'renewal' was examined in *Anjiah* v. *Regional Transport Officer, Guntur*[3]. In that case an order of suspension had been passed for breach of one of the conditions of the permit. Pending the disposal of the appeal challenging the correctness of the suspension order, the permit period had expired and the permit-holder had been granted a renewal. On the rejection of the appeal against the suspension order subsequently, the question arose whether the suspension order could be enforced against the renewed permit. In holding that it cannot be done, the Court observed: "An applicant for renewal of a stage carriage permit along a particular route will generally have to survive competition along with other applicants when he applies for renewal, and all that he can claim is a preference over others if other conditions are equal. Where therefore a permit is granted to him once more, it cannot in our opinion be treated as the old permit extended for a fresh period". The Court was also inclined to draw a distinction between the renewal of a permit of a private carrier or motor cab and the renewal of a stage carriage permit. It was observed that "while

1. L.R. (1891) A.C. 173, 183.
2. (1956) I.L.R. 34 Pat. 429.
3. (1956) An. W.R. 344.

in the case of the renewal of a permit of a motor cab, it may not be inappropriate to describe the new permit as the old permit with an extended period, the same cannot be said of a stage carriage permit granted to the holder of a previous permit ". The assumption underlying the distinction is that in the case of a motor cab the renewal is almost automatic whereas in the case of renewal of the permit of a public carrier there is no such automatism. This assumption does not seem to be altogether correct, in view of rule 185, according to which in certain circumstances there is an automatic renewal of the permit in the case of a stage carrier also. It is, however, true that in no case is there a right of renewal as such, and when a permit is renewed there is no right for the permit-holder to insist on the continuance of the old terms either. As against these considerations it is apparent that the language of section 58 (1) shows that when there is a renewal, the effective period is not the original period specified, but the period up to which the renewal is granted thereby suggesting that the life of a renewed permit is one and continuous. In that view in *Muthuvadivelu* v. *Regional Transport Officer*[1], it was held that where the renewal is obtained on the basis of a permit which is subsequently cancelled, it could not be regarded as a fresh permit, that when the original permit is set aside it must be taken to be *non est* for all purposes, and that the renewal must be deemed to be a nullity. The Supreme Court has in the second of the decisions under notice approved this line of thought and held that 'renewal' is in essence a continuation of the original permit and an order of suspension or cancellation of the original permit can be operated against the renewed permit as well. The Supreme Court also recognises that, while it is undoubted law that when the terms of a contract are reduced to writing no condition can be implied therein, it is at the same time clear that there can be a condition subsequent on the happening of which a permit will cease, and that there is no legal obstacle to implying a condition that the renewal of the permit should stand cancelled if the right of the holder to the original permit was negatived. The conclusion arrived at in the first of the decisions under notice is thus reinforced by the Supreme Court. Though in a renewal both elements, continuity as well as replacement, are present it is the context only that can determine which of these elements is the dominating factor in the particular case.

THIRUMALAI NAIDU *v.* CHALLAPATHI NAIDU, (1957) 1 M.L.J. 349.

Rule 8 of the Madras Cultivating Tenants Protection Rules, 1955, provides that the proceedings of the Revenue Divisional Officer shall be summary and shall be governed as far as possible by the provisions of the Civil Procedure Code as to the issue of service of summons, examination of parties and witnesses, and the production of documents. Having regard to the summary character of the proceedings and the specifying of particular matters alone regarding which advertence to the principles of the Civil Procedure Code is to be had, it would seem that the Revenue Divisional Officer will have no inherent jurisdiction to set aside any order passed by him *ex parte*. It is a well-known principle that when once a matter is disposed of the order thereon acquires finality unless the Court or Tribunal is clothed with special powers to reopen such finality. The instant case affirms this principle.

LAKSHMI REDDY *v.* LAKSHMI REDDY, (1957) 1 M.L.J. (S.C.) 46.

To constitute adverse possession, the requisite possession must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor, *Radhamoni Debi* v. *Collector of Khulna*[2]. The possession must be *nec vi, nec clam, nec precario*, see *Secretary of State for India* v. *Debendra Lal Khan*[3]. The possession held should have been overt and not clandestine, open and not fugitive, so that the person against whom time is running ought, if he exercises due vigilance, be aware of what is actually happening. Even if it be the Government against whom the adverse enjoyment is set up it will not be permitted to plead that the fact of adverse possession had not been brought to its notice. Nor is it necessary for the establishment of adverse possession;

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1. A.I.R. 1956 Mad. 143.
2. (1906) L.R. 27 I.A. 136 : I.L.R. 27 Cal. 943 (P.C.).
3. (1933) 66 M.L.J. 134 : L.R. 60 I.A. 78 (P.C.).

that the proof relating to such acts of possession should cover and account for every moment of the requisite period. In Scotland it had always been the law that " though the possession be not proven to have continued every quarter, month or year, yet ordinary possession will be sufficient *ad victoriam causae* albeit it be proponed in the terms of a continual possession *quia probatio extremis praesumuntur media*, if the distance be not great."[1] Even if the several acts of possession are at considerable intervals it may yet be continuous. How many such acts should be proved must necessarily depend on the nature of the case. It must necessarily vary with the nature of the subject-matter possessed and the possession must be of the kind which the particular subject is susceptible of. Thus, for instance, in regard to land liable to submergence the acts of possession can relate only to a period when the land was not covered by water and it may well be that a considerable interval of time separates one act of possession from another. Also, possession will never be considered to be adverse if it can be referred to a lawful title, *Thomas* v. *Thomas*[2]. Hence adverse possession of one co-heir against others cannot be established by the mere fact of his sole possession and enjoyment of the properties. In *Corea* v. *Appuhamy*[3], the defendant who was one of four coparceners by descent had taken possession of the suit property in 1878 and settled the same on his son in 1907. A suit was brought by the assignees of the interests of the other coparceners for partition of the property. The defendant claimed to have acquired exclusive title by adverse possession and enjoyment. In rejecting the defence, Lord Macnaghten observed : "Entering into possession and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his co-proprietors ". The noble Lord went on to state : "His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result". In *Cully* v. *Doed. Taylerson*[4], the limits of the rule that possession of one coparcener is that of another were propounded as follows : "Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the possession of the other, and to enable the party complaining to maintain an ejectment there must be an ouster of the party complaining. But where the claimant tenant-in-common has not been in the participation of the rents and profits for a considerable length of time and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been any ouster." In the instant case, the Supreme Court points out that to constitute ouster there must be evidence of open assertion of hostile title coupled with exclusive possession to the knowledge of others, and, where one co-heir has maintained such possession and continued it for a considerable length of time and the excluded co-heirs took no steps whatever to obtain relief, ouster could be inferred.

The Supreme Court touched off another point as well in the instant decision. It is well settled law that the possession of a receiver appointed by the Court is the possession of the Court itself and as such the possession of all the parties to the action according to their titles, *Bertrand* v. *Davies*[5], Re *Ind. Coope & Co.*[6]. The property will be deemed to be in *custodia legis*. The receiver is only a stakeholder and his custody ultimately enures to the benefit of the true owner, *Ramaswami* v. *Mathuraswami*[7], *Khagendra* v. *Matangini*[8] and *Rao Karan* v. *Raja Bahadur*[9]. The instant decision makes it clear that the rule as to the receiver's possession being that of the successful party cannot be pushed to the extent of enabling a person initially not in possession to claim the tacking on of the receiver's possession to his own subsequent adverse possession, but that it may be different when the defendant holding adversely prior to the suit is dispossessed by the receiver and subsequently the defendant succeeds and gets back his possession.

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1. Stair's Institutions of the Law of Scotland IV, 40, 20.
2. 2 K. & J. 79, 83.
3. L.R. (1912) A.C. 230.
4. 3 P. & D. 539 : 52 R.R. 566.
5. (1862) 31 Beav. 429.
6. L.R. (1911) 2 Ch. 223.
7. (1906) I.L.R. 30 Mad. 12.
8. (1890) I.L.R. 17 Cal. 814 (P.C.).
9. (1882) I.L.R. 5 All. 1 (P.C.).

RAJA RAJESWARI AMBAL *v.* DISTRICT BOARD TINNEVELLY, (1957) 2 M.L.J. 73.

This decision deals with a question of more than passing interest, namely, whether the expression "persons entitled to be maintained from the estate or its income" within the meaning of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) includes within its ambit institutions like a choultry which are to be maintained or supported out of the estate income. Under section 44 of the Act the Tribunal shall apportion the compensation deposited by the Government consequent on the abolition of the estates among the principal landholder and any other persons whose rights or interests in the estate stand transferred to the Government under section 3, clause (*b*) including persons who are entitled to be maintained from the estate and its income. 'Persons' in law may be either natural or artificial. The former are always human beings. The latter is a fiction which the law recognises for certain reasons. A religious or charitable institution is endowed by law with personality, and, in that way a choultry is a person. A payment to an individual for purpose of his support or sustenance is described as maintenance. By parity of reasoning a grant for the support of an institution may also be viewed as maintenance in a broad sense. The purpose being the same, namely, the continued existence of the object, it would not be a misnomer to call it 'maintenance'. Nor does the term maintenance stand conditioned upon any antecedent obligation of the grantor under his personal law to support the grantee. The point is made clear in *Anirudha Mitra* v. *Official Receiver*[1], where the Court observed : "But we cannot say that there could not be a maintenance grant unless there was an antecedent obligation on the grantor to maintain the grantee under the personal law of the parties. An obligation to maintain may arise *de hors* the personal law as under a contract or by way of bounty. Nor is there any thing inconsistent with the concept of maintenance if the grant takes the form of an annuity or is charged on property and made heritable or alienable. This aspect of the matter was adverted to in *Lakshmi Venkayamma* v. *Surya Rao Bahadur*[2], where it was stated : "The owner of property may be under a personal obligation to pay maintenance to another or he may in his bounty agree to pay maintenance to another. This right to maintenance may be embodied in a document creating a charge over the property or only creating a personal obligation on the owner. The right may be confined to the lifetime of the grantee or may be made heritable or both heritable and transferable. Whatever may be the terminology used, if the object of the grant was to provide for the maintenance of the grantee, the fact that the right to receive periodical payment from out of the income of the estate is made heritable or even transferable, cannot make the grant any the less a grant for maintenance". It would thus follow that a charge in perpetuity created over property for the support of a choultry can be regarded as a maintenance grant and the institution as a maintenance-holder in a loose sense of the term. The real question however will still remain, namely whether in the context of section 44 and other sections of the Madras Estates Abolition Act a choultry can be treated as a person entitled to be maintained from the estate or its income; in other words, whether the term 'person' will include an inanimate institution. From the collocation it is fairly apparent that the term 'persons entitled to be maintained' should be construed *ejusdem generis* with the term 'landholder' who is a natural person, and therefore as signifying only human beings having the right to be supported by the estate or its income, see *Gopalakrishna* v. *Sarvagna Krishna*[3]. The learned Judges in the instant case have reached a similar conclusion that the term 'persons entitled to be maintained' which occurs at different places in the Act has reference only to natural persons and will not include institutions.

DHARMAPURAM MUTT *v.* COLLECTOR OF TRICHINOPOLY, (1957) 2 M.L.J. 97.

This is a useful decision which incidentally affords guidance in regard to a practice point. Investigation of title to property is done by solicitors and is relatively a simple affair in England. In India investigation of title to property is very often not

1. I.L.R. (1942) 1 Cal. 427.
2. (1956) An. W.R. 37.
3. (1955) An.W.R. 590.

made prior to a transaction of sale and purchase of property or investment in property. Investigation of title in this country is also to some extent a difficult matter. For one thing, there is no standard period here for the root of title. Nor are title deeds meticulously or systematically preserved as in England. The recognition afforded to benami transactions, the peculiarities of the Hindu joint family tenure with its ownership of property in commensality, the tenancy-in-common obtaining among Muslim co-heirs have all added to the difficulties of investigation. Notwithstanding these factors, investigation of titles following the English conveyancing practice and precedents is to the fore in an increasing measure in India also at the present time. Under section 55 (1) (*b*) of the Transfer of Property Act the seller is under an obligation to produce the title deeds for inspection by the buyer in order that he may satisfy himself about the title, *Jyotiprasad* v. *H. V. Low & Co.*[1]. If the buyer omits to take inspection he runs a risk and he will be deemed to have had constructive notice of matters which he would have discovered had he made an investigation of the title, *Harilal* v. *Mulchand*[2]. The same principles will apply where an investment of money deposited in Court under land acquisition proceeding has to be made. Under the English law when the title is not registered under the Land Registration Act, 1925, the seller has to prepare and deliver an abstract of title, and the title deeds and other evidence are produced for verification of the abstract. But in India this practice does not generally obtain. Section 55 (1) (*b*) enables the prospective buyer or investor to make enquiries when on an examination of the documents of title the buyer is not satisfied. The enquiries are thus essentially for the protection of the buyer or investor and call attention to possible omissions of disclosure by the seller. The investigation of title and any enquiries that may have to be made thereupon have to be carefully done and by a competent lawyer. In *Srimati Charan Manjari Dasi* v. *Land Acquisition Collector*[3], an Attorney had been engaged with the approval of the Land Acquisition Judge and he had made the necessary investigations regarding the suitability, market value, and title of the property and did other things incidental to the completion of the investment; and the Attorney submitted at the end of it all a bill in respect of the work done by him. On a question arising whether the Land Acquisition Collector can legitimately object to the payment of the bill out of the money deposited in Court whose investment had occasioned the employment of the Attorney's services Gugha and Bartley, JJ., observed: "On the materials before us we have no hesitation in coming to the conclusion that the work done by the Attorney as evidenced by his bill of charges were acts essential and necessary for purchasing property and as such were reasonable charges and expenses as contemplated by section 32 (2) of the Land Acquisition Act." In the instant case, an argument was advanced that the cost of examining the title deeds cannot be included in the term cost of investment" in section 32 (2). In rejecting the contention the Court observed: "Before an investment can be made properly, and no Court should encourage improper and careless investment, the title deeds have to be carefully examined by a competent lawyer. It would be wholly unjustifiable to disallow a reasonable advocate's fee for examination of such title deeds." The instant decision further laid down that though in England it is usual to allow a fee of one per cent. for the examination of title deeds of properties of high value, in India, having regard to the fact that it is a poor country, an Advocate's fee of a half per cent. can be granted. In the case under consideration, the properties involved and the sum to be invested were worth Rs. 83,400. A sum of Rs. 450 as Advocate's fee for the examination of the title deeds was deemed to be proper.

MURUGAN, IN RE., (1957) 2 M.L.J. 9.

The doctrine of 'grave and sudden provocation' as an extenuating factor in reducing murder to manslaughter has been the subject of consideration in many cases, but its scope remains as elusive as ever. In *R.* v. *Hayward*[4], Tindal, C.J., explained the terms as signifying " provocation so recent

1. (1930) I.L.R. 57 Cal. 1189.
2. (1928) I.L.R. 52 Bom. 883.
3. A.I.R. 1935 Cal. 119.
4. 6 C. & P. 157.

and strong that the prisoner might not be considered at the moment master of his own understanding". In *Reg.* v. *Walsh*[1], Keating, J., pointed out that "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man and so to lead the jury to ascribe the act to the influence of that passion." The Central Court of Criminal Appeal accepted this test in *Rex* v. *Lesbini*[2], as correctly expressing the legal position. In that case the prisoner entered a shooting gallery at which the deceased was one of the attendants. She used with reference to him some language which was perhaps provocative but was intended to be jocular. The expression was however understood by the prisoner to involve an offensive reference to himself or his race. Shortly therefter the deceased happened to drop her keys and the prisoner picked them up and returned them to her, for which act she thanked him and remarked that his temper was soon over. She then handed over to him a revolver to practise shooting at a target. But he levelled the weapon at her, chased her when she fled and shot her fatally. The learned Judges held that this was not a case of grave and sudden provocation as would reduce the offence from murder to manslaughter. In *Rex* v. *Hopper*[3], Lord Reading, C.J., explained the principle to mean that the provocation received should be such as tended to make the appellant lose control of himself at the critical moment when he fired the rifle. The House of Lords examined the question fully in *Mancini* v. *Director of Public Prosecutions*[4], and Viscount Simon, L.C., observed : "It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control as the result of which he commits the unlawful act which causes death. ....In short, the mode of resentment must bear a reasonable relationship to the provocation, if the offence is to be reduced to manslaughter." The British Courts have also held that in the case of sexual misconduct, it is only the actual finding of a spouse in the act of adultery that would constitute grave and sudden provocation, but not a sudden confession of adultery by either spouse to the other. It is further held that the exception cannot be extended to any other case. Typical of this line of decisions is that in *Holmes* v. *Director of Public Prosecutions*[5]. It was there observed : "The whole doctrine relating to provocation depends on the fact that it causes or may cause a sudden and temporary loss of self-control whereby malice which is the formation of an intention to kill or to inflict grievous bodily harm is negatived. Consequently where the provocation inspires an actual intention to kill or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognised, *viz.*, the actual finding of a spouse in the act of adultery. This has always been treated as an exception to the general rule ; but it has been rightly laid down that the exception cannot be extended. A sudden confession of adultery by either spouse without more can never constitute provocation of a sort which might reduce murder to manslaughter," An analysis of the English decisions shows that (i) the provocation must be wholly recent and strong ; (ii) it should be such as to make a reasonable man lose all control over himself ; (iii) the mode of resentment must bear reasonable relationship to the provocation ; (iv) the finding of a spouse in the act of adultery will amount to such provocation ; (v) a sudden confession of adultery by either spouse will not constitute such provocation ; and (vi) the exception cannot be extended.

In India, *Exception* 1 to section 300 lays down that culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The *Explanation* to the *Exception* makes it clear that whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. To fall within the scope of the *Exception* the act of causing death should have been done by the offender under the influence of some feeling depriving him of all self-control engendered by a provocation which is both 'grave and sudden, *Chervirala*

1. (1869) 11 Cox 336, 338.
2. L.R. (1914) 3 K.B. 1116 (C.C.A.).
3. L.R. (1915) 2 K.B. 431, 435.
4. L.R. (1942) 2 A.C. 1, 9.
5. 1946 All E.R. 124.

Narayan, In re.[1] The terms 'grave and sudden provocation' in *Exception* 1 to section 300 must be deemed to have been used with the connotation they have acquired in English law. It is therefore rather curious that in some of the decisions the scope of the doctrine has been extended to cover the case of a mistress being found in the arms of a former lover (*Kota Potharaju* v. *Emperor*[2]), or a sister having intercourse with a paramour (*Amarsingh Rangaraju* v. *State*[3]). That apart, a more intriguing question has been whether a wife's refusal to give up her intimacy with her paramour and statement of her intention to continue such relationship would be sufficient to constitute grave and sudden provocation within the meaning of *Exception* 1 to section 300. In *Sukhai* v. *Emperor*[4], the deceased who was the wife of the accused was leading an immoral life and the husband was aware of it. His attempts to make her cease to lead such a life were not successful. One day the couple along with their seven year old daughter had gone to the railway station to catch a train. On arrival at the station they found they would have to wait for some hours before they could catch the train. While they were so waiting the wife went out and some time later when the husband went to look for her he found her outside the station having intercourse with a man. On his flinging a stone at that man he went away. The husband's version as to these facts was corroborated subsequently by the testimony of the daughter. The couple boarded the train when it arrived, got down at their destination and were walking through a grove. The child having in the meanwhile fallen asleep, the husband reproached the wife for her conduct and instead of expressing repentance she said she would continue to do such acts and abused her husband. He became enraged and beat her with a stick. She struggled with him and bit his fingers. Thereupon he pulled out a knife and stabbed her fatally. The Allahabad High Court held that the case fell within *Exception* 1 to section 300. The Court observed : "We think that the immediate provocation at the grove coming on top of all that had gone before was sufficient to come within *Exception* 1 to section 300 of the Indian Penal Code and to reduce the offence from murder to culpable homicide." The impenitence of the wife and her biting the husband's fingers may be the proverbial last straw that broke the camel's back. But it is debatable whether a husband who was fully aware of the repeated infidelities of his wife and the futility of his remonstrances could be said to be moved not merely into a grave but also a sudden provocation by her struggle to avoid the beating and her biting his fingers so as to make him entirely lose control over himself. The cause for the provocation was all along there, and his resentment had never before mastered him so as to make him lose his self-control. The test that the mode of resentment should bear reasonable relationship to the provocation can hardly be said to be satisfied. In so far as the instant case adopts the same line of reasoning as the Allahabad judgment it is liable to criticism. Nor can any distinction be founded, as is done in the instant case, on the different social approach to the problem of adultery in this country as justifying a departure from the English law. Even in this country, adultery is not a matter attracting punishment for the woman. In the instant case, the husband had found the wife in *flagrante delicto*. He assaulted her paramour giving vent to his anger. It was, however, after the lapse of a long time, that, while the husband and wife were sitting opposite the police station waiting for it to open to enable the husband to comply with a summons to be present there, the husband implored his wife to give up her association with her paramour. On her refusing to do so stating impudently that she would continue in her conduct, and abusing him he took out a knife and stabbed her as a result of which she died. What happened in front of the police station might have fanned the flame smouldering in his heart against her. But it is rather difficult to regard it as a grave and sudden provocation. In *Mathappa Goundan* v. *State*[5], the accused had all along a suspicion of illicit relationship between his wife and another man. On the day of the occurrence, while his wife was proceeding towards the other man's house, the husband tried to stop her from going. She defied him whereupon he cut her with an aruval fatally. The Court held that in the

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1. 1958 An.W.R. 149.
2. 1931 M.W.N. (Cr.) 233.
3. 1956 Cr.L.J. 408.
4. A.I.R. 1925 All. 696.
5. 55 Cr.L.J. 733 : 1953 M.W.N. (Crl.) 309.

circumstances the provocation was neither grave nor sudden. To distinguish that case from the instant case on the ground that in the latter there was actual knowledge of the wife's infidelity in addition to her defiant and inpenitent attitude is not altogether satisfactory. The fact that in the instant case even when the husband found his wife in the act of adultery he did not get provoked to take any action against her shows that that fact had not in any way made him lose his self-control. Again as pointed out in *Dhanno Khan* v. *The State*[1], each little provocation cannot be called grave simply because the consequences ensuing therefrom at the hands of the accused have been grave. The provocation must be such as will upset not merely a hasty, hot-tempered, hyper-sensitive man but would upset also a person of ordinary sense and calmness. The protection afforded by *Exception* 1 to section 300 is the protection for normal beings reacting normally in a given set of circumstances.

THANGAVELU ASARI *v.* LAKSHMI AMMAL, (1957) 2 M.L.J. 132.

In all cases of remarriage by a Hindu widow whether permitted by usage or otherwise the remarriage is held to entail the forfeiture or the divesting of the widow's estate, as the principle upon which a widow took her husband's property was that she was his surviving half. *Murugayi* v. *Viramakali*[2]. The same result ensued under section 2 of the Hindu Widow's Remarriage Act as well. Abjuration of Hinduism by the widow prior to her remarriage was held to leave the position unaffected. The Allahabad High Court had taken a different view on these matters from the other High Courts where remarriage has taken place by virtue of custom or after the widow had become a convert to another religion. That Court held that in such cases there will be no forfeiture of rights either under Hindu law or by reason of section 2 of the Hindu Widow's Remarriage Act. A question of a different nature is whether there will be forfeiture of rights on remarriage where a widow had taken not limited but absolute rights. In *Arunachalam Chetty* v. *Seshiah Chetty*[3], the coparceners of the husband had entered into a settlement with the guardian of a minor widow in respect of her claim to maintenance during all her lifetime at a fixed sum in satisfaction of which a promissory note was executed by them to her uncle as guardian. Later on the widow remarried. A contention was raised that she would in consequence lose her maintenance claim in respect of her first husband's estate and therefore the promissory note could not be enforced. The contention was rejected and the Court held that when once the promissory note and the discharge document had been executed there was no longer any claim or interest of the widow in her husband's property left outstanding for the forfeiture provision to operate. The same question came up for consideration directly in *Bangaru Reddy* v. *Mangammal*[4]. In that case *B* and *S* were two brothers who were members of an undivided family. *S* had married *M* in August, 1937, but a few months later, in April, 1938, he died. His wife *M* was then a minor. In June, *B* executed a deed of settlement in favour of *M* under which she was given some properties absolutely. In September, 1941, *M* married again one *V*. Thereupon it was argued that the remarriage operated as a forefeiture of the rights *M* had obtained under the settlement deed of June, 1938. In repelling the contention Rajamannar, J., observed : " It is clear that this section (section 2 of Act XV of 1856) has no effect on property belonging to the widow absolutely on the date of the remarriage. The rights and interests which she may have in her deceased husband's property by way of maintenance obviously refer to recurring rights, as for example, to payment of maintenance by the enforcement of a charge on her deceased husband's property. In the case of wills and other testamentary dispositions it is only the limited interest that ceases and determines. In my opinion the words as 'if she had then died' supply the criterion for adjudicating on the rights and disabilities of the widow on remarriage. All the results which would follow the remarriage are results which would ensue if she had died on the date of the date of the remarriage. In other words, if she had only a limited and life interest then, that would cease ". The learned Judge added that it

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1. A.I.R. 1957 All. 317.
2. (1877) I.L.R. 1 Mad. 226.
3. (1938) 2 M.L.J. 701.
4. (1946) 2 M.L.J. 377.

is clear that when property is conveyed absolutely to a widow by her husband's coparceners in full quit and satisfaction of her claim to maintenance such a transaction would not be affected by her remarriage. In the instant case, the widow had taken absolute rights under a compromise decree and later on she had remarried. It was held that section 2 can cause a forfeiture only when the widow was in enjoyment of rights and interests of a limited amplitude at the time of her remarriage, and that the theory that every compromise implied the recognition of an antecedent title in every one of the parties taking benefit under it is not universally true. Under the Hindu Succession Act, 1956, a Hindu widow takes her husband's property in full ownership. Hence consistently with the conclusions reached in the instant decision and other cases there can be no forfeiture of the estate under section 2 of Act XV of 1856 : nor will there be any scope for the introduction of the theory of a defeasible estate for a Hindu widow, defeasible on her contracting a remarriage, having regard to the unqualified language of section 14 of the Hindu Succession Act.

KUPPAMMAL *v.* DEVENDRA IYER, (1957) 2 M.L.J. 134.

The settlement of the proclamation of sale and the terms thereof by the Judge is not an adjudication of a right but merely an administrative order, *Rangachariar* v. *The Trinity Bank, Ltd*[1]. The object of the provisions in Order 21, rule 66, Civil Procedure Code, is to afford a security for the fairness of public sales that there has been fair publication and that purchasers would be attracted, *Venkateswara Ethu Naicker* v. *Ayyamma*[2]. Clause (*e*) of Order 21, rule 66, only requires that the proclamation should contain the value of the property as stated by the decree-holder and the judgment-debtor. It is not as if despite this provision a duty is cast on the Court by reason of clause (*f*) to fix its own valuation and to insert it in the sale proclamation. The enactment of clause (*e*) only means that the residuary clause (*f*) covers matters other than the market value of the property. There is no obligation on the executing Court to conduct an enquiry into the value of the property to be sold and mention such value in the sale proclamation, *Srinivasan* v. *Andhra Bank, Ltd*[3]. But in *Arunachalathammal* v. *Kanagasabapathi Pillai*[4], it has been suggested that where there is a wide divergence between the decree-holder's valuation and the judgment-debtor's valuation it is desirable for the Court to have the property valued by an amin and to have such valuation inserted in the sale proclamation. The case under review points out that what the previous decision indicates is only the desirability of adopting such a course and not that there is an obligation to that effect incumbent upon the Court. The instant decision makes it clear that in any event both figures, namely, the figures mentioned by the decree-holder as well as the judgment-debtor cannot be fixed as upset prices.

SRINIVASA SASTRI *v.* SRI SANKARACHARIAR, (1957) 2 M.L.J. 144.

Section 48, Civil Procedure Code, requires that the application for execution should be presented in all circumstances before the lapse of twelve years from the date of the decree. It is the presentation of the application within the prescribed period that matters. The period of limitation found in the section cannot be curtailed by delays that may be caused by the machinery provided in the Civil Procedure Code for the transfer of decrees. Where an application for execution and transfer of the decree is filed in the Court which passed the decree within twelve years thereof, and during the pendency of such application an application for the execution of the decree is also filed in the transferee Court within that period, the execution of the decree will not be barred under section 48 although the actual order for transfer and the certificate of non-satisfaction of the decree were signed and sent to the transferee Court after twelve years from the date of the decree, *Anantha Kumar* v. *Surendra Kumar*[5]. In *Arunachalam* v. *Lingiah*[6], the facts were similar. An application for execution had

1. (1948) 1 M.L.J. 61.
2. (1950) 1 M.L.J. 22.
3. (1948) 2 M.L.J. 569.
4. (1955) 1 M.L.J. 285.
5. I.L.R. (1948) 1 Cal. 475 : A.I.R. 1947 Cal. 424.
6. (1952) 2 M.L.J. 347.

been filed in the transferee Court on July 12, 1946, before the order for transmission of the decree to that Court had been passed by the Court which had passed the decree. But the actual order for transmission was made on July 13, 1946, within twelve years from the date of the decree. It was held that in the circumstances, the application in the transferee Court was a valid and competent application that could be acted upon. If, however, the order of transmission of the decree for execution had been passed after the expiry of twelve years from the date of the decree, the fact that an execution application had been filed in the transferee Court before the expiry of twelve years will not avail to save the decree-holder from the bar of section 48, Civil Procedure Code, *Madali Adamma* v. *Venkatasubbayya*[1], *Manikam* v. *Ramaswami*[2]. In the instant case, the order of transmission had been made after expiry of twelve years from the date of the decree, with the result that the application had to be held to be time-barred.

RANGASWAMI REDDI *v.* DORAISWAMI REDDI, (1957) 2 M.L.J. 196.

The repercussions of a material alteration of a promissory note by the plaintiff upon the recoverability of the consideration for the instrument have been examined from time to time by Courts in England as well as in India. In *Davidson* v. *Cooper*[3], Lord Denman C.J., observed that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. In *Gardner* v. *Walsh*[4], Lord Campbell, C.J., pointed out that " the defendant is discharged from the liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice". These decisions signify that *any* alteration of the instrument will disqualify the plaintiff from recovering irrespective of the question of prejudice or absence of it. If, however, the alteration had been made by a stranger the plaintiff will not be affected. In *Hutchins* v. *Scott*[5], Alderson, B, stated : " It is difficult to understand why an alteration by a stranger should in any case avoid the deed, why the tortious act of a third person should affect the two parties to it unless the alteration goes to the length of making it doubtful what the deed originally was or what the parties meant ". The same principle was laid down in *Hong Kong and Shanghai Bank* v. *Lo Lan Shi*[6]. In that case with reference to the provisions of the Bills of Exchange Ordinance, 1885 of Hong Kong, Lord Buckmaster observed : " Both the history of the law which this section enunciates and the terms of the section itself show that it relates only to alterations effected by the will of the persons by whom or under whose directions they are made, and that it does not apply to a change due to pure accident ". In India, section 87 of the Negotiable Instruments Act had laid down that any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made to carry out the common intention of the original parties. Thus for the section to be attracted the alteration must be material and made without the consent of the other party. In *Govindaswami* v. *Kuppuswami*[7], the suit was to recover the amount due on a bond executed by the defendant on September 11, 1882. The date had been altered to September, 25 while the bond was admittedly in the custody of the plaintiff. In holding that the bond became void by reason of the material alteration and the document could not be received as evidence of the debt inasmuch as the contract between the parties had been reduced to writing and the plaintiff can recover only on the writing itself but not outside it, the Court observed : " The contract between the parties having been reduced to writing and the only ground of action disclosed by the plaint being that which is founded upon the altered instrument the plaintiff can only recover upon the writing. But it is undoubted law that the plaintiff cannot recover upon the written contract because it has been altered in a material part. Nor can the document be received in evidence

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1. (1933) 65 M.L.J. 137 : I.L.R. 56 Mad. 692.
2. (1944) 2 M.L.J. 403.
3. (1844) 13 M. & W. 343 : 153 E.R. 142.
4. (1855) 5 E. & B. 83 : 119 E. R. 412.
5. (1837) 2 M. & W. 809 : 150 E.R. 984.
6. L.R. (1928) A.C. 181 (P.C.).
7. (1889) I.L.R. 12 Mad. 239.

of the debt. . . In the present case, the suit is not based on any antecedent transaction for which the instrument was given as security, nor did the execution of the instrument vest in the plaintiff any estate or right of the existence of which the deed would be evidence". The decision makes it clear that (*a*) material alteration precludes the party from enforcing the instrument, (*b*) the instrument cannot be received in evidence to prove the terms of the contract between the parties, and (*c*) it may be a different matter if the suit was in respect of an antecedent loan for which the instrument is security or evidence. Where the material alteration was not made by the plaintiff but by some one else, then, the plaintiff's rights will remain unaffected. In *Krushnacharana Padhi* v. *Gourochandro Dyano Sumanto*[1], the alteration in a promissory note had been made during the period when the plaintiff was still a minor. Abdur Rahman, J., held that the alterations referred to in section 87 of the Negotiable Instruments Act referred to deliberate alteration by a party to the instrument or by one on whom his interest has devolved and not by a stranger, particularly when no conduct could be imputed to the party in whose interest the alteration has been effected or from which either his complicity, laches or negligence may be inferred. This statement of the law was confirmed on appeal. After adverting to Lord Buckmaster's remarks in the *Hong Kong and Shanghai Bank Case*,[2] Leach C.J., observed: "If a material alteration which is the result of an accident does not bring the instrument within the mischief of the section, surely the same must apply where a material alteration had been made by a meddlesome or maliciously minded stranger without the consent of the holder of the instrument and without any fraud or negligence on his part. To hold otherwise would mean the doing of grave injustice to an innocent party and this could never have been the intention of the Legislature in inserting section 87 in the Negotiable Instruments Act"[3].

The question has been raised sometimes whether when the instrument evidencing the terms of a contract has become void by reason of a material alteration in the instrument it is still not possible for the plaintiff to recover from the other party thereto any advantage which that party, might have received in pursuance of the contract, under section 65 of the Contract Act. That section lays down that when an agreement is discovered to be void or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it. In *Chitturi Suriah* v. *Boddu Ramayya*[4], a sum of Rs. 800 had been advanced to the defendant by the plaintiff on an agreement of January, 9, 1910, to supply 300 bags of paddy at Rs. 3-11-0 per bag. The defendant could not perform his part of the contract. On August 26, 1910, he returned Rs. 400 to the plaintiff. In regard to the remaining Rs. 400 the defendant said that the plaintiff had agreed to accept Rs. 150 in full quit and satisfaction. In a suit by the plaintiff for recovery of the entire balance it was found that in the ledger in which the terms of the contract were entered there was a material alteration. In holding that because of the last fact the plaintiff could neither enforce the contract nor recover any sum as damages, a decree was, however, given for the sum of Rs. 400, the admittedly unreturned part of the advance. The conclusion was based in part on the admission of the defendant and partly on *Illustration* (*c*) to section 65. Similarly, in *Anantha Rao* v. *Surayya*[5], while affirming the principle that where a party to a written contract has made a material alteration of the terms without the knowledge and consent of the other party the former cannot enforce the contract, it was at the same time held that any advance which had been made and of which the defendant had not denied liability could be recovered. Thus in both the above cases the directions to return the advance was rested on the admission of party and was not by way of enforcement of the contract. In *Krushanacharana Padhi's Case*[1], however, Abdur Rahman, J., observed in regard to the recovery of the consideration of the instrument

1. (1939) 2 M.L.J. 686.
2. L.R. (1928) A.C. 181 (P.C.).
3. (1941) 1 M.L.J. 153 : I.L.R. (1941) Mad. 295.
4. (1915) M.W.N. 150.
5. (1919) 38 M.L.J. 256 : I.L.R. 43 Mad. 793.

"One may not be able to enforce the terms contained in the instrument but there can be no objection to the Court looking at it and granting the relief on the basis as if the document had not come into existence. The promissory note having become void, the defendant who had received an advantage under the instrument is bound to restore it or to make compensation for it. There seems to be no reason why the Court should not act in such a case on the principle embodied in section 65 of the Contract Act". It is difficult to see how, when the instrument has become void by reason of a material alteration in its terms, and its terms in consequence had become unenforceable, the remedy could be had as it were by the backdoor, since it is not possible for the plaintiff to let in evidence of the terms of the Contract in any other way by reason of the principle in section 91 of the Evidence Act. Section 65 of the Contract Act cannot apply because what becomes void by reason of the material alteration is the instrument embodying the terms of the Contract and not the contract itself. The instant case points out that if the loan evidenced by the note had been advanced on an earlier date and the note had been executed subsequently, the note may be treated as an acknowledgment of the loan and as security, for it and the plaintiff may obtain a decree on the loan despite the note becoming unenforceable on account of the material alteration. But where the money was advanced only at the time of the note section 91 of the evidence Act will bar the admission of evidence *aliunde* to prove the passing of consideration.

THE INDIAN INSURANCE & BANKING CORPORATION, LTD., SALEM *v.* PARAMASIVA MUDALIAR, (1957) 2 M.L.J. 256.

Under section 70 of the Transfer of Property Act, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to accessions to the property. It would follow that a purchaser in execution of the mortgage decree also will have the same right. To encourage trade, in England, the principle is relaxed to some extent as regards trade fixtures. It is however confined to cases arising out of the relation of landlord and tenant and does not apply where the person who annexes the fixture is the owner of the soil whether the annexation of the fixture was for a permanent purpose and for the better enjoyment of the land or for the purpose of trade or manufacture, *Fisher* v. *Dixon*[1], *Mather* v. *Fraser*[2], *Cullwick* v. *Swindell*[3]. In India, the English law rules as to fixtures do not in terms apply. It is essentially a question of the intention of the parties as to what passes under a transfer—*see* section 8, Transfer of Property Act. In *Satyanarayanamurthi* v. *Gangayya*[4], it was observed: "We are prepared to assume that in certain circumstances, machinery existing in the mortgaged premises on the date of the mortgage and even machinery subsequently installed there may pass under a mortgage of premises. . . It may not always be possible to treat the machinery brought into a building as an 'accession' within the meaning of sections 63 and 70 of the Transfer of Property Act. It may in some cases become necessary to consider how far the definition of the expression 'attached to the earth' in section 3 of the Transfer of Property Act will bear upon the decision of the question". If, as suggested, it is a question of fact the relevant factors in ascertaining the intention of the parties will be the extent of annexation and the object of it. In *Veerappa* v. *Ma Tin*[5], it was held that machinery in a mortgaged building will not become a part of the security unless it is attached to the building for the permanent beneficial enjoyment thereof. In *Narayan Sa* v. *Balaguruswami Nadar*[6], the question was what passed to an execution purchaser, the premises sold having been described as "distillery buildings". It was held that the distillery vats were movables having been brought in for trade purposes and not for the beneficial enjoyment of the building. The Court observed: "In cases where business is carried on in the premises and the sale is only of the premises and not of the business as a going concern or the premises together with the fixtures or machinery, *prima facie* all

1. (1845) 12 Cl. & F. 312.
2. (1856) 2 K. & J. 536.
3. 1860 L.R. 3 Eq. 249.
4. (1939) 1 M.L.J. 692, 694.
5. (1925) 68 I.C. 1011: A.I.R. 1925 Rang. 250.
6. (1923) 45 M.L.J. 385.

that the purchaser is entitled to are the buildings. It can hardly be the intention of the parties when they sell the buildings alone without reference to the machinery or business that the purchaser should get the valuable machinery in the buildings by calling them fixtures and by claiming to get them under that head". In the case under notice, the property sold had been described as "municipal S. No. 222-B1, together with the cinema theatre building being built on dates of suit mortgages and subsequently completed and named 'Shanmugha Talkies' with compound walls all round". The question at issue was whether it would include what had been brought into the premises for the purpose of running a cinema in the building, and in particular 94 ceiling boards and 4 exhaust fans. It was held that what was sold was only the building and not the theatre as a going concern, that therefore the articles in question cannot be regarded as attached to the building and forming part of it, and that the purchaser in execution of the mortgage decree would not be entitled to the same.

CHINNAPPA CHETTY *v.* GOPALA CHETTY & BROS., (1953) 2 M.L.J. 269.

The *raison d'etre* behind the judgment-debtor being allowed to apply for the setting aside of an execution sale even where he had subsequently to the sale sold away the property has been vividly explained in *Sundaram* v. *Mayusa Maruthar*[1]. Wallis, C.J., observed in that case: "Section 310-A was introduced into the Civil Procedure Code, in the interests of the judgment-debtor to protect him from loosing his property by a Court sale at an under-value as too often happens. Now, so far as the judgment-debtor's property is concerned, his interest in setting aside the Court sale is just as great when he has effected a private sale after attachment as when he has not. On setting aside the Court sale, if he has not effected a private sale, he gets back the property itself; if he has effected a private sale after the attachment he gets the price into which he has converted the property. If he fails to set aside the Court sale, the private sale goes off and he gets in neither the property nor the price. The right given him by the Code puts him much in the position of a mortgagor and he loses his equity of redemption unless the sale is set aside. He therefore retains a clear interest in setting aside the sale". It was also held that the purchaser from the judgment-debtor cannot apply to set aside the execution sale under that provision. In 1936, Order 21, rule 89, was amended providing that where immovable property was sold in execution of a decree the judgment-debtor or any person holding an interest in the property may apply to have the sale set aside. In *Lakshminarasamma* v. *Satyanarayana*[2], it was held that a person buying the property from the judgment-debtor subsequent to the Court sale will under the amended Order 21, rule 89, be a person holding an interest in the property for the purpose of applying to set aside the sale. In the instant case it was contended that in view of the fact that such purchaser had now been granted the right to apply to set aside the sale the judgment-debtor has no longer any need for the right for himself and therefore should be deemed to have lost his right to apply under Order 21, rule 89. The contention was repelled as untenable mainly in view of the fact that the term 'judgment-debtor' is expressly retained in the rule and not dropped despite its amendment.

[END OF VOLUME (1958) 1 M.L.J.].

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1. (1921) 40 M.L.J. 497: I.L.R. 44 Mad. 554 (F.B.). 2. (1943) 2 M.L.J. 151.